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In The

Supreme Court of the United States

October Term, 2002

ESPLANADE PROPERTIES,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioner and has filed the letters of consent with the Clerk of the Court.[1]

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO THEIR ABILITY TO HAVE GOVERNMENTAL LAND USE DECISIONS REVIEWED AS A VIOLATION OF SUBSTANTIVE DUE PROCESS

The NAHB represents over 205,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the protection provided to landowners when, as in the case at bar, a court holds that the Takings Clause subsumes within it any possible claim of a violation of the substantive due process portion of the Fourteenth Amendment.

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1 No counsel for either party authored any part of this brief. No person or entity other than the NAHB has made any monetary contribution to the preparation or submission of this brief.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)[2], *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

The petitioner in the case at bar has submitted three questions to the Court. The NAHB submits its *amicus curiae* brief in support of the petition with respect only to the third question presented – whether the protection provided by the substantive due process portion of the Fourteenth Amendment is subsumed within that provided by the Takings Clause – because the resolution of the question will, as a practical matter, determine whether a landowner will ever be able to state a claim for relief which may be considered by a federal court in light of the Court's decision in *Williamson County*, *supra*.

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2 The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

SUMMARY OF THE ARGUMENT

The normal reasons for the Court's decision to grant its writ of certiorari are set out in Rule 10. The NAHB contends that the Court's review is called for under both subsections (a) and (c) in that the Ninth Circuit's opinion highlights a conflict between a substantial number of the Circuits and because it presents an important question of federal law which, although not decided explicitly by the Court, is nevertheless in conflict with a number of its decisions.

ARGUMENT

I. WHETHER THE TAKINGS CLAUSE SUBSUMES WITHIN IT THE SUBSTANTIVE DUE PROCESS PORTION OF THE FOURTEENTH AMENDMENT IS A MATTER OF SHARP DISAGREEMENT AMONGST THE CIRCUITS

A. There Is An Explicit Conflict Amongst The Circuits.

The Ninth Circuit has interpreted the Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989), and *Albright v. Oliver*, 510 U.S. 266 (1994), to mean that no claim for relief in a land use case can be stated under the substantive due process portion of the Fourteenth Amendment because the Takings Clause provides an explicit textual source of constitutional protection. *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996), cited in the case at bar at 307 F.3d at 982.

The Ninth Circuit does not stand alone. *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

On the other hand, the other Circuits which have addressed the question have come to the opposite conclusion and have held that a landowner may proceed with both substantive due process and takings claims.

The Fifth Circuit, after reviewing the conflicting law from other Circuits, stated:

> Although the above cited cases involved factual settings different from Appellants', we can say that a blanket rule that under *Graham*, the Takings Clause subsumes any substantive due process claim relating to a deprivation of properties is both inconsistent with our precedents and with the approaches taken by a majority of other circuit courts.

John Corp. v. City of Houston, 214 F.3d 573, 583 (5th Cir. 2000) [footnote omitted]. The Fifth Circuit reaffirmed its position only two weeks ago in *Sandy Creek Investors, Ltd v. City of Jonestown*, _F.3d_, 2003 WL 1469455 (5th Cir. March 24, 2003), at 6.

In *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201 (6th Cir.), *cert. denied*, 516 U.S. 816 (1995), the Sixth Circuit stated:

> Ordinarily, a party must seek compensation through the procedures established by the state and cannot bring a federal constitutional takings claim until he or she has been denied

> compensation through these procedures. . . . However, under current law of this circuit, the substantive due process claim appears to be ripe.

In *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997), the District of Columbia Circuit stated: "But in this circuit at least, under [an earlier opinion], the requirements of the Takings Clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition."

The First Circuit distinguishes between substantive due process and takings claims but evaluates them using the same decisional framework. *South County Sand & Gravel Co., Inc. v. Town of South Kingstown*, 160 F.3d 834, 835 (1st Cir. 1998).

The Seventh Circuit recognizes the potential for both substantive due process and takings claims but applies the same ripeness requirements imposed by this Court in *Williamson County*, *supra*. *Forseth v. Village of Sussex*, 199 F.3d 363, 368-69 (7th Cir. 2000).

Finally, the Eleventh Circuit differentiates between what it has described as "takings" claims, "due process takings" claims and "arbitrary and capricious due process" claims. *Eide v. Sarasota County*, 908 F.2d 716, 720-22 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). A plaintiff is entitled to assert both a takings and a due process claim. *Corn v. City of Fort Lauderdale*, 95 F.3d 1066, 1076 (11th Cir. 1996), *cert. denied*, 522 U.S. 981 (1997). However, the Eleventh Circuit allows only "arbitrary and capricious due process" claims; a "takings"

claims subsumes within it a "due process takings" claim. *Villas at Lake Jackson, Ltd v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997).

B. A Number Of Circuit Courts Have Addressed Substantive Due Process Claims On Their Merits.

Several Circuits have reached the merits of substantive due process claims in the land use context without addressing the question of whether those claims were subsumed within the Takings Clause. *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 503-505 (2d Cir. 2001); *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir.), *reh'g denied*, – F.3d –, 2003 WL 1595871 (3d Cir. 2003); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440-441 (4th Cir. 2002); and *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068,1070-1071 (8th Cir. 1997).

In order to ripen a takings claim, a plaintiff must seek compensation through the procedures provided by the state. *Williamson County*, *supra*, 473 U.S. at 194-197. Ripeness in the land use context is jurisdictional. *Forseth*, *supra*, 199 F.3d at 368; *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991); *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 500 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); and *Greenbriar, Ltd v. City of Alabaster*, 881 F.2d 1570, 1573 n. 7 (11th Cir.), *reh'g denied*, 893 F.3d 346 (11th Cir. 1989). Finally, appellate courts are required to ensure that they have jurisdiction before reaching the merits of a dispute. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999).

In each of the land use cases cited above, the plaintiff had filed its complaint directly in federal court. In none of the opinions did the Court of Appeals even mention the possibility that the case was not ripe because the plaintiff had failed to make use of state provided procedures, something which would have been required had the substantive due process claim been subsumed within the Takings Clause. In each case, the Court of Appeals decided the case on its merits; had the case been unripe, the only proper procedure would have been to dismiss – not decide – the case. *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726, 739 (1998); and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). There is no different rule in land use cases. *Sandy Creek Investors*, *supra*, at 6-7; *Forseth*, *supra*, 199 F.3d at 367, *Bickerstaff Clay Products Co., Inc. v. Harris County*, 89 F.3d 1481, 1491 (11th Cir. 1996); and *Southern Pacific Transportation*, *supra*, 922 F.2d at 507.

The fact that the Courts of Appeals reached the merits argues that they believed that substantive due process claims are **not** subsumed within the Takings Clause, contrary to the Ninth Circuit's position.[3]

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[3] In fairness, it should be noted that courts are not bound by exercises of jurisdiction where that jurisdiction was not questioned but neither should a court – including this Court – "'disregard the implications of an exercise of judicial authority assumed to be proper' in previous cases." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962).

II. THIS COURT HAS REVIEWED CLAIMS IN THE LAND USE CONTEXT UNDER THE SUBSTANTIVE DUE PROCESS PORTION OF THE FOURTEENTH AMENDMENT

A. This Court Has Reviewed Claims In The Land Use Context Under Both Substantive Due Process And The Takings Clause

In *Mugler v. Kansas*, 123 U.S. 623 (1887), the Court addressed a Kansas statute prohibiting the manufacturer of intoxicating liquor which prohibited Mugler from making use of his brewery. The Court analyzed the validity of the statute under both substantive due process (661-667) and the Takings Clause (667-670).

The Court analyzed the denial of the land use project in *Williamson County*, *supra*, as both a takings claim (473 U.S. at 186-197) and as a substantive due process claim (473 U.S. at 197-200).

Further, the Court has frequently analyzed claims involving money (as opposed to land) to determine whether a taking has occurred or whether the right to substantive due process has been violated. *See*, *e.g.*, *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993) (substantive due process, 636-641; takings, 641-647). In *Eastern Enterprises*, *supra*, four Justices evaluated the plaintiff's claim under the Takings Clause while five Justices evaluated it under the substantive due process portion of the Fourteen Amendment.

B. This Court Has Repeatedly Analyzed Claims In The Land Use Context To Determine Whether A Violation Of Substantive Due Process Has Occurred.

The Court has analyzed governmental actions in the land use context to determine if a substantive due process violation has occurred in both its earliest and its latest zoning cases. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), *Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928), and Section III of the Court's decision in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. _ (March 25, 2003).

It should also be noted that the concurring opinion in *Cuyahoga Falls* by Justice Scalia, joined in by Justice Thomas, mentioned the Takings Clause and then argued that the Equal Protection Clause subsumed within it substantive due process claims. Thus, the Court is well aware that there is an issue of whether a substantive due process claim can be asserted in the land use context.

III. CONCLUSION

If every claim involving governmental regulation of land use must be brought under the Takings Clause and if over a hundred years of judicial history is to be reversed, then it should be the pronouncement of this Court which does so. The explicit and implicit conflicts between the Circuits and the dissonance of the position taken by the Ninth Circuit with opinions by this Court present an important question of federal law which has not been, but should be, settled by the Court.

Accordingly, the NAHB respectfully requests that the Court grant Esplanade Properties' petition for writ of certiorari.

DATED: April 4, 2003

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